No. 84-1340

IN THE

Supreme Court of the United States

October Term, 1984

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,
Petitioners,

vs.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President; and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE STATES OF MINNESOTA, CALIFORNIA, LOUISIANA, NEBRASKA, NEW MEXICO AND WISCONSIN AND THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Amici States, through their Attorneys General, respectfully offer this brief in support of respondents. Amici are public employers who seek to retain newly hired, qualified minority employees deemed underrepresented in the state work force. The retention of such employees fosters respect for and enhances the effectiveness of state activities which seek to eliminate racial discrimination and promote equal rights.

Amici are subject to adverse economic conditions that have required or may in the future require employee layoffs. Because newly hired minority employees are among the least senior employees, traditional seniority systems requiring the last hired to be the first fired result in disproportionate layoffs of minorities. Amici have negotiated or may in the future consider negotiating collective bargaining agreements with public employees containing provisions designed to preserve prior affirmative action gains in state employment.[1] In addition, Amici have enacted or may in the future consider enacting legislation authorizing non-seniority layoffs of public employees for the same purposes.[2]

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[1] *See* Appendix A for the relevant provisions of the collective bargaining agreement between the Minnesota Association of Professional Employees and the State of Minnesota for the period July 1, 1983-June 30, 1985, and the agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, October 30, 1983-June 30, 1985.

[2] *See* Appendix B for relevant provisions of California and Wisconsin statutes and the Wisconsin Administrative Code.

SUMMARY OF ARGUMENT

The Court should allow public employers to make race-conscious layoffs, especially when mutually agreed upon in a collective bargaining agreement, for the purpose of retaining qualified minority employees deemed underrepresented in the state work force. Such layoffs are consistent with the equal protection clause because they further the state's compelling interest in remedying the effects of past discrimination in its own work force and encouraging private employers to reach the same goal. Race-conscious layoffs are narrowly tailored to those purposes because they are temporary and reasonable.

The congressional determination in Title VII[3] that past discrimination in employment has resulted in racial imbalance, together with a public employer's determination of minority underrepresentation in a particular work force, establishes the remedial purpose of such layoffs.

Title VII permits private employers to make such layoffs, and the requisites for engaging in affirmative action under Title VII, outlined in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), are functionally equivalent to factors considered in a strict scrutiny analysis under the equal protection clause. There is thus no basis for imposing greater restrictions on race-conscious remedial actions by public employers than on private employers.

Because of the above reasons the judgment below should be affirmed.

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[3] Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. §§ 2000e *et seq.*

ARGUMENT

I. A PUBLIC EMPLOYER'S LAYOFF PLAN WHICH RETAINS UNDERREPRESENTED MINORITIES FURTHERS THE COMPELLING STATE INTERESTS OF ELIMINATING THE EFFECTS OF PAST DISCRIMINATION IN PUBLIC EMPLOYMENT AND PROVIDING A MODEL FOR THE COMMUNITY.

The states have a compelling interest in eliminating the effects of past discrimination. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978). In enacting Title VII, Congress found that minority underrepresentation in employment is often the continuing effect of past discrimination. Given this congressional finding, a state's determination that minorities are underrepresented in its work force establishes a compelling state interest in eliminating race discrimination through race-conscious layoffs. In addition, the state's efforts to eliminate the vestiges of discrimination in its own work force serves the compelling interest of providing leadership to private employers and others in eliminating such vestiges.[4]

[4] This brief analyzes race-conscious layoffs under the strict scrutiny standard of review. If a racial classification satisfies the strict scrutiny standard of review, it certainly also satisfies the intermediate standard of review proposed by Justice Brennan in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The intermediate level of review requires that racial classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives." 438 U.S. at 359.

A. Minority Underrepresentation in The Public Employer's Work Force is Likely to be The Result of Past Discrimination.

Title VII was the congressional answer to pervasive racial discrimination in employment. At the time Title VII was enacted, blacks were largely relegated to unskilled and semi-skilled jobs and the relative position of black workers was steadily worsening. 110 Cong. Rec. 6547-6548 (1964) (statement of Sen. Humphrey). The goal of the statute was to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Id.* at 6548. To that end, Congress enacted a measure which would break down the barriers to black employment even absent proof that those barriers had the purpose of excluding blacks. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

In 1972, Congress amended Title VII to bring public employees under the purview of the statute.[5] Congress relied on findings of the United States Commission on Civil Rights, which reported that "widespread discrimination against minorities exists in State and local government employment," and that "employment discrimination in State and local governments is more pervasive than in the private sector." H.R. Rep. No. 238, 92 Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News, 2137, 2152. Congress noted commission studies which showed that in most geographic areas examined, blacks constituted more than 70% of the common laborers, but that "most white-collar jobs were found to be largely

[5] *See* the Equal Employment Opportunity Act of 1972, Pub. L. No. 42-261, §§ 2(1), (5), 86 Stat. 103.

inaccessible to minority persons." *Id.*[6] In addition, the Commission found that discrimination against minorities in state and local government employment had been perpetuated through both institutional and overt discriminatory practices. Segregated job ladders, invalid selection techniques, and stereotyped misconceptions regarding minority group capabilities all contributed to the perpetuation of past discrimination. *Id.* Thus, in amending Title VII, Congress concluded that widespread discrimination has prevented blacks from attaining full representation in the public sector work force.

A similarly broad legislative finding provided the constitutional justification for using the affirmative action measures at issue in *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980). In enacting the minority contract set-aside provision, Congress concluded that "private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.* at 503 (Powell, J., concurring). Justice Powell explicitly rejected the need for

[6] Racial disparities continue to threaten "the credibility of the government's claim to represent all the people equally. . . ." 1972 U.S. Code Cong. & Ad. News 2137, 2153. In 1981, the last year for which published figures are available, minority public employees (excluding those in school systems and educational institutions) were more than twice as likely to be found in janitorial and similar service occupations as whites. According to the U.S. Equal Employment Opportunity Commission, 26.9% of the black work force were service/maintenance workers in 1981, while only 12.6% of white workers held those jobs. In contrast, white public employees were more than twice as likely as minorities to work as officials and administrators. In 1981, 6% of all whites held official or administrative jobs while only 2.8% of minorities held similar jobs. *See* U.S. Dept. of Commerce, *Statistical Abstract of the United States*, 1985, at 294, Table No. 476. For a description of job categories, see Equal Employment Opportunities Commission, *Job Patterns for Minorities and Women in State and Local Government*, 1980, App. at 5-6.

a more specific finding of past discrimination noting that "Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties." *Id.* at 502. A broad-based congressional determination of discrimination in public employment plus a determination of underrepresentation in a particular public employer's work force should establish a remedial purpose sufficient to satisfy the compelling interest test.

In addition to the compelling interest of eliminating the vestiges of discrimination in its own work force, the state has a compelling interest in setting an example for private employers and the community. In amending Title VII to include public employers, Congress found that many public agencies perform "governmental activities which are most visible to the minority communities (notably education, law enforcement and the administration of justice)." H.R. Rep. No. 238, *supra*, 1972 U.S. Code Cong. & Ad. News at 2153. The failure of such agencies to eliminate within their own work forces the vestiges of discrimination has "the result that the credibility of the government's claim to represent all the people equally is negated." *Id. See, e.g., Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 695 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (presence of black police officers generates public support and cooperation from the black community and contributes to crime prevention).

Respect and confidence in government is eroded to the extent that public employers are more restricted than private employers in achieving work forces free of the vestiges of discrimination. For this reason, public employers require, at a minimum, parity with the private sector in retaining an array of techniques, including layoff plans designed to maintain prior progress in hiring qualified minorities, to eliminate the vestiges of discrimination.

B. In View of Congress' Finding of Past Discrimination in Public Employment, a Determination by the Public Employer of Minority Underrepresentation in its Work Force Establishes a Remedial Purpose.

In non-employment contexts, Justice Powell would require judicial, legislative, or administrative findings of constitutional or statutory violations to justify remedial race classifications. *Bakke, supra,* 438 U.S. at 307; *Fullilove, supra,* 448 U.S. at 497 (concurring opinion). The purpose of this requirement is to ensure that the remedial purpose behind the racial classification is substantial and well-defined. *Id.* The congressional determination in Title VII that minority underrepresentation in public employment is due to past discrimination ensures that the state interest in remedying such discrimination is substantial.[7] The congressional determination is, however, predicated upon the existence of minority underrepresentation. Thus, any remedial racial classification by a public employer should require a determination that substantial minority underrepresentation exists in its work force.

[7] Justice Powell indicated in *Bakke* that Congress has already made the finding necessary to establish a compelling state interest in remedying past discrimination in employment. Justice Powell stated:

> The presumption in *Griggs*—that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination. . . . Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

Regents of the University of California v. Bakke, supra, 438 U.S. at 308 n.44. *See United States v. City of Miami, Fla.,* 614 F.2d 1322, 1337 (5th Cir. 1980).

The public employer is well suited to making such a determination.

Minority underrepresentation is the key to demonstrating remedial purpose because it is the key to demonstrating race discrimination. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977) (statistical evidence of minority underrepresentation establishes a *prima facie* case under Title VII); *Village of Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 266 n.13 (1977) (under some circumstances, minority underrepresentation demonstrates a constitutional violation). As this Court has recognized:

> [Racial] imbalance is often a tell-tale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

Requiring public employers to make or obtain a finding that they have violated the constitution or statutes before they may institute affirmative action plans runs contrary to the policy of encouraging voluntary compliance with the law. *See Bakke, supra,* 438 U.S. at 364 (Brennan, J., dissenting in part). Title VII "puts great emphasis on voluntarism in remedial action." *Id.* at 364 n.38. To avoid undue federal regulation of private enterprise, Title VII left intact the private sector's ability to effectuate the goals of the Act voluntarily. *Weber, supra,* 443 U.S. at 206-207. States, even more than private employers, ought to be able to voluntarily accomplish federal government goals. *See United Jewish Organizations of Williamsburg v. Casey,* 430 U.S. 144, 162-163

(1977). State affirmative action is particularly important in the employment discrimination area because Title VII itself reserves for the states the right to enforce the Act through state agencies. *See* 42 U.S.C. § 2000e-5(b)(c) (1976); 1972 U.S. Code Cong. & Ad. News 2137, 2154.

In any event, public employers should not be forced to admit they intentionally discriminated in the past before they may initiate affirmative action plans. Such a concession could give rise to Title VII claims from past victims. *See Van Aken v. Young*, 541 F. Supp. 448, 451 (E.D. Mich. 1982), *aff'd*, 750 F.2d 43 (6th Cir. 1984). Moreover, requiring more than underrepresentation to establish remedial purpose places public employers on the tightrope described by Judge Wisdom in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting):

> On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action.

Accordingly, minority underrepresentation alone should be sufficient to establish the remedial purpose of a public employer's affirmative action plan given the findings of Title VII.[8] This result encourages voluntary remedial action and allows public employers to avoid Titie VII liability.

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[8] This brief does not address the proper measure of underrepresentation in the circumstances of this case.

II. A COLLECTIVELY BARGAINED PROVISION DESIGNED TO RETAIN UNDERREPRESENTED MINORITIES BY LIMITING MINORITY LAYOFFS IS NARROWLY TAILORED TO ITS REMEDIAL PURPOSE.

Layoff provisions which are narrowly tailored to their remedial purpose are permissible under both Title VII and the Constitution. When such provisions are the product of collective bargaining they should be presumed to be narrowly tailored. Furthermore, such provisions are the only means for protecting minority hiring gains and do not unnecessarily trammel the interests of white employees.

A. The Tailoring Tests for Affirmative Action Plans Are Functionally Equivalent for Private Employers Under Title VII And Public Employers Under the Constitution Because the Policy Concerns Under Both Tests Are the Same.

Once a compelling government interest is established, a reviewing court must then determine whether the race-conscious program uses a constitutionally appropriate means of serving that interest. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). This Court has not required remedial plans "to be limited to the least restricted means of implementation." *Id.* at 508. Rather, "choice of remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination." *Id.* at 510. Factors to consider in determining the reasonableness of any affirmative action plan include: the efficacy of alternatives, the duration and flexibility of the plan, the goal of the plan in relation to the percent of minorities in the

relevant labor force, and the effect of the plan on innocent parties. *Id.* at 510-11.

The analysis under the equal protection clause is functionally equivalent to factors considered in a Title VII analysis. Because remedial race-conscious layoffs survive a Title VII analysis, they should also survive analysis under the equal protection clause. The issue under both is whether the means adopted to implement the remedial purpose are sufficiently tailored. In an equal protection clause analysis, "the means selected must be narrowly drawn to fulfill the governmental purpose." *Id.* at 498 (Powell, J., concurring). In the Title VII context, the means must "not unnecessarily trammel the interests of the white employees," and be temporary. *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). The function of both tests is clearly to assure that the interests served by remedial race-conscious remedies could not be served equally well by "less intrusive means." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring). Factors applied in Title VII cases addressing the scope of race-conscious hiring remedies have been considered in the context of cases under the equal protection clause. *Id.*

The legislative history of the 1972 amendments to Title VII (the Equal Employment Opportunity Act of 1972) underscores the functional equivalency of the equal protection clause and Title VII analyses. In enacting the 1972 Equal Employment Opportunity Act, Congress believed that

> the expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.
>
> Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill. Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. §1983.

H.R. Rep. No. 238, *supra*, 1972 U.S. Code Cong. & Ad. News at 2154.

Because constitutional and statutory analyses of voluntary remedial race-conscious actions in the employment context serve the same functions, a number of courts have arrived at the same result under both analyses and recognized the lack of substantial distinction between them.[9] In *Kromnick v.*

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[9] The argument that remedial racial classifications satisfying Title VII should also satisfy the equal protection clause is not diminished by this Court's holding in *Washington v. Davis*, 426 U.S. 229 (1976). *Davis* held that the constitutional and statutory proof requirements differ when a minority challenges neutral practices with substantially disproportionate racial burdens. Proof of discriminatory purpose is required under the equal protection clause, *id.* at 239, but not under Title VII. *Id.* at 246-47. The Court in *Davis* was concerned that the absence of a discriminatory purpose requirement under the equal protection clause might invalidate a number of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the average black than the more affluent white. *Id.* at 248. In contrast, acknowledging the functional equivalency of equal protection clause and Title VII standards in reviewing remedial racial classifications does not endanger the validity of a whole range of statutes.

School District of Philadelphia, 739 F.2d 894 (3rd Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 782 (1985), the court upheld under both the Constitution and Title VII a collectively-bargained race-conscious teacher transfer progam to remedy racial imbalance. In *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 976 (1st Cir. 1982), *vacated and remanded for reconsideration of mootness*, 461 U.S. 477 (1984), the court recognized that race-conscious layoffs to overcome the vestiges of discrimination are permissible under the Constitution and Title VII. In *Hammon v. Barry*, 606 F. Supp. 1082, 1097 (D.D.C. 1985), the court observed the development of a "merging of Constitutional and Title VII considerations" in judicial evaluation of race-conscious remedies. *See also Baker v. City of Detroit*, 504 F. Supp. 841, 848 (E.D. Mich. 1980), *app. sub nom., Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 703 (1984) (*Weber* test should be extended to reverse discrimination claims brought under the fourteenth amendment); Case Comment, *Bratton v. City of Detroit*, 17 Akron L. Rev. 473, 480 (1984); Kreiling & Mercurio, *Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action*, 88 Dick. L. Rev. 46, 79 (1984); Jacobs, *Justice Out of Balance: Voluntary Race-Conscious Affirmative Action in State and Local Government*, 17 The Urban Lawyer 1, 25 (1985).

In *Weber, supra*, this Court set forth the factors to consider in deciding whether a particular affirmative action plan

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Moreover, the distinction drawn in *Davis* had little practical effect on minority public employees alleging race discrimination because, after 1972, they could bring their claims under Title VII. Public employers, however, have no choice of what provision—constitutional or statutory—under which they will be sued. Thus, recognizing that either analysis should arrive at the same resu t places public and private employees on an equal footing.

is permissible under Title VII. 443 U.S. at 208. These factors should also determine whether a public employer's affirmative action plan is permissible under the Constitution. Collectively bargained layoff provisions which retain underrepresented minorities meet the *Weber* criteria.

First, such layoff provisions are "designed to break down old patterns of racial segregation and hierarchy," *id.* at 208, and to "eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209. This requirement is the same remedial purpose requirement analyzed under equal protection. Minority underrepresentation is the clearest indication of racial segregation and hierarchy. *See e.g., Setser v. Novak Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981). Layoff provisions designed to retain underrepresented minorities should be presumptively remedial.

Second, such provisions do "not unnecessarily trammel the interests of the white employees." *Weber, supra*, 443 U.S. at 208. These provisions do not require layoffs of white employees. They merely permit layoffs if declining demand, financial considerations or other factors so require. These provisions do not require only whites to bear the burden of layoffs. Minority employees are subject to termination within the traditional "last-hired, first-fired" seniority system whenever such layoffs do not decrease the proportion of minority employees. Nor do such provisions erode any legitimate interest of white employees, who do not have a constitutionally

protected or contractual interest in layoffs by reverse order of seniority.[10]

Third, such provisions are temporary measures, which expire together with other contract provisions at the termination of the agreement. Usually, there is no contractual provision for automatic renewal of the layoff plan in subsequent contracts. The temporary nature of the measure is demonstrated in the *Jackson* case by the rehire of seven of the eight petitioners. Petitioner's Brief at 7.

The permissible limits of affirmative action plans are the same for public employers under Title VII and the Constitution. This Court should explicitly recognize this equivalency to assure public employers that their obligations in enacting affirmative action provisions are the same under both governing provisions. Furthermore, collectively bargained layoff provisions which retain underrepresented minorities are permissible under Title VII and hence under the Constitution.

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[10] This factor is one of many which distinguishes this case from *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S. Ct. 2576 (1984). There the Supreme Court held that section 703(h) of Title VII barred a district court from ordering race-conscious layoffs to protect black hirees who had been the beneficiaries of a prior remedial consent decree that did not itself limit seniority rights. Section 703(h), which protects bona fide seniority plans, is inapplicable where the employer and union agree on a modified seniority layoff system to accommodate affirmative action. In such cases there is no seniority override. *See e.g., Kromnick v. School District of Philadelphia, supra*, 739 F.2d at 911.

B. Collectively Bargained Layoff Plans Should be Presumed to be Narrowly Tailored.

It is particularly appropriate to permit remedial race-conscious layoff plans by public employers when the plans are collectively bargained.

This Court accords deference to collectively bargained agreements. The "collective bargaining process 'lies at the core of our national labor policy' " and national policy favors "minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76-77 (1982) (citations omitted). This Court has also recognized that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems," *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980), and that

> [A] collective bargaining agreement may . . . [e]nhanc[e] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement.

Franks v. Bowman, 424 U.S. 747, 778-79 (1976).

A layoff provision which is the product of collective bargaining can be presumed to be narrowly tailored in that it is subject to change at regular intervals. In addition, such agreements are the product of a voluntary, democratic process in which the union is charged with representing the interests of white employees. *Cf. Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S. Ct. 2576, 2586 (1984) (consent decree could not be modified by court order partly because

union and non-white employees did not have opportunity to agree to layoff provision).

The challenged racial classification is subject to approval by union members and an elected school board. *See* Mich. Comp. Laws § 380.211. Union officials in a democratically operated union and popularly elected members of a school board run the risk of losing membership or voter support for proposing or urging provisions that cut deeply into public perceptions of fairness. Thus, the approval mechanisms for the challenged layoff plan serve to ensure its narrow tailoring.

C. Race-Conscious Layoffs are Necessary to Maintain Minority Hiring Gains.

The only way to preserve recent minority hiring gains when layoffs are required is to depart from the traditional "last-hired, first-fired" seniority system. Clearly, "it is vital that affirmative action hiring practices involve some degree of job security. Without some correlative job protection, the familiar last-hired, first-fired policy is likely to make any gains shortlived." Sherman, *Affirmative Action: Case for Substantive Labour Law*, 19 Val. U.L. Rev. 95, 108 (1984); *see also* Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1603-4 (1969) (continuation of traditional seniority system perpetrates racial discrimination when lack of minority seniority is product of racial discrimination). No practical alternative exists for protecting affirmative action hiring gains when layoffs are required other than by making race-conscious layoffs.

The challenged layoff provision, like the layoff provision in Minnesota's contract (see Appendix A), does not seek to

increase the proportion of minorities but merely to maintain the current level of minorities in the work force. The limited goal serves to minimize the number of whites harmed by the layoff provision.

That some whites must share the burden of layoffs is not fatal to a racial classification. In *Fullilove*, the Court explained that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." *Fullilove*, 448 U.S. at 484 (citation omitted). The burden on whites is then clearly permissible because it is an unavoidable consequence of furthering a compelling state interest with narrowly tailored means.

The challenged provisions are a necessary means of retaining currently underrepresented minorities in the work force, they impose only temporary burdens on innocent whites, and have been filtered through the collective bargaining and political processes to assure fairness. Therefore, the challenged provisions are sufficiently tailored under the equal protection clause and should be permitted.

CONCLUSION

A public employer's race-conscious layoff plan designed to retain recently hired minorities who are underrepresented in the employer's work force serves the remedial purpose of eliminating the vestiges of racial discrimination and is narrowly tailored to accomplish that purpose. Such a plan satisfies the strict scrutiny test of the equal protection clause.

Dated: August 23, 1985.

Respectfully submitted,

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APPENDIX

APPENDIX A

Article 17, § 14 of the General Professional Labor Agreement between the Minnesota Association of Professional Employees and the State of Minnesota, July 1, 1983-June 30, 1985, provides:

> *Section 14. Affirmative Action.* In accomplishing a layoff pursuant to this Article, the Appointing Authority may deviate from the layoff procedure provided in this Article whenever such layoffs would conflict with established goals and objectives of the State's Affirmative Action/Equal Opportunity program or where the published goals of the Affirmative Action/Equal Opportunity program have not been met in a specific seniority unit by protected group as defined in Minnesota Statutes 43A.02, Subdivision 33.
>
> In seniority units where the goals and timetables of the Affirmative Action/Equal Opportunity program have not been met, seniority shall be used in layoff, except that *in no event shall the percentage of employees laid off in protected groups be greater than the percentage of all employees to be laid off in the same seniority unit.* In the event that the layoff would cause the layoff of employees with greater than three years seniority in the classification being reduced in the seniority unit then the provisions of this Section shall not be applied to the layoff of those employees (emphasis added).

Article VIII, § 2(C)(1)(2) of the Agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, October 30, 1983 - June 30, 1985, provides:

(C) Employees within the employing unit within the same class shall be ranked by seniority as defined in Article V, Section 1 with the least senior employe laid off first, except that the Employer may exercise one of the two following options:

(1) *The Employer may lay off out of line seniority to maintain a reasonable affirmative action program* or where there is a demonstrable need for special skills. The Employer shall provide the Union with information relating to the exercise of these exemptions if so requested.

(2) The Employer may exempt 5% of the employes within an employing unit within the same class from the layoff procedure; however, such 5% shall not be less than one person (emphasis added).

APPENDIX B

Cal. Gov't Code § 19798 (West 1980) provides:

§ 19798. Order and subdivisions of layoff and reemployment; effect of past discriminatory hiring practices

In establishing order and subdivisions of layoff and reemployment, the [state personnel] board, when it finds past discriminatory hiring practices, shall by rule, adopt a process that provides that the *composition of the affected work force will be the same after the completion of a layoff, as it was before the layoff procedure was implemented* (emphasis added).

Wis. Stat. § 230.34(2)(a)(b) provides as follows:

(2) Employes with permanent status in class in permanent, sessional and seasonal positions in the classified service and employes serving a probationary period in

such positions after promotion or transfer may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated.

(a) The order of layoff of such employes may be determined by seniority or performance or a combination thereof *or by other factors.*

(b) The administrator shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employe right of restoration or eligibility for reinstatement (emphasis added).

Wisc. Admin. Code Division of Personnel ER-Pers 22.06 (1)(2) provides as follows:

ER-Pers 22.06 Procedure for making layoffs. (1) The appointing authority shall identify the class, the class subtitle as approved by the administrator at the time of layoff, or the classification progression series approved by the administrator, in which layoff is to occur, hereafter called the layoff group. Full-time and part-time positions may constitute different layoff groups.

(2) The appointing authority may exempt from the layoff group up to 2 employes or 20%, whichever is greater, of the number of employes in the layoff group to retain employes having special or superior skills or for other such purposes as may be determined by the appointing authority. In addition, *for affirmative action purposes, the appointing authority may exempt female,*

minority and handicapped employes in the layoff group in a manner that retains the proportional representation of each of these groups in the layoff group. In applying the percentages for these exemptions, any fraction may be rounded to the next whole number. Exercise of these exemptions shall be declared by the appointing authority as part of the layoff plan submitted under ER-Pers 22.05 (emphasis added).
